In the Supreme Court of the United States

OCTOBER TERM, 1956.

Nos. 703 and 704.

THE LAKESHORE COMPANY,

Petitioner,

vs.

THE CITY OF EUCLID,

Respondent,

and

BENJAMIN D. ZEVIN and LILLIAN C. ZEVIN,

Petitioners,

vs.

THE CITY OF EUCLID,

Respondent.

BRIEF OF RESPONDENT, THE CITY OF EUCLID, In Opposition to Petition for Writ of Certiorari.

PRELIMINARY STATEMENT.

The brief of the petitioners, incorporated in their petition, does not, we believe, present a correct statement of the question sought to be presented to this Court.

The Respondent, City of Euclid, will therefore set forth under the heading "Statement of the Cases" a restatement of the cases below, which we believe is a clearer and more exact summary of the record.

STATEMENT OF THE CASES.

The cases originated in appropriation proceedings instituted by the City of Euclid, pursuant to the provisions of Chapter 719 of the Revised Code of Ohio.[1] An application was filed in the Common Pleas Court of Cuyahoga County for a jury to be empanelled to assess the compensation due to the owners of certain lands appropriated by the Council of the City of Euclid for purposes of a municipal park and other municipal uses.

The property appropriated was an area of land located along the northerly side of Lake Shore Boulevard, in the City of Euclid and extended northwardly to the shore of Lake Erie. The frontage on the northerly side of Lake Shore Boulevard was approximately seven hundred feet. The frontage on Lake Erie was somewhat larger by reason of the fact that the sidelines of the parcel appropriated were not parallel.

There were four separate record owners of parcels of land composing the parcel appropriated by the City of Euclid. Each of such separate owners were named parties to the proceedings.

For purposes of trial, the trial court ruled that each separate owner was entitled to a separate trial and verdict as to the compensation due to him or it, but before the same jury, pursuant to the provisions of Chapter 719 of the Revised Code of Ohio.[2] The trial was conducted in such manner. The evidence in the hearings as to the com-

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[1] The Municipal Appropriation Act consists of Sec. 719.01 through Sec. 719.21, Revised Code of Ohio.

[2] *Sec. 719.01* of the Revised Code of Ohio provides:

"The assessment of compensation by a jury as provided in Section 719.08 of the Revised Code shall be in writing, signed by the jury, and shall be so made that the amount payable to the owners of each lot or parcel of land may be ascertained."

pensation due each owner was substantially the same, except as to the value of each separate parcel.

Three of the four property owners appealed to the Court of Appeals for the Eighth Judicial District of Ohio, who affirmed the verdicts. Only the petitioners here appealed to the Supreme Court of Ohio, who denied motions to certify.

The first of the property owner's witnesses described the zoning restrictions of the lands not only on the northerly side of Lake Shore Boulevard, but also on the south side thereof. Such evidence is well summarized in the Court of Appeals' opinion (pages 4a and 4b of Appendix to Petitioners' petition). Such first witness of the petitioner further not only testified, but identified exhibits which were introduced in evidence by the petitioners, which uncontradictedly demonstrate that there was not then presently or in the then foreseeable future any probability of any amendment of the zoning ordinance of the City of Euclid which would permit the use of the lands lying on the northerly side of Lake Shore Boulevard for a lesser restricted use than at present.[3] No evidence was introduced or offered which would tend to controvert the testimony of petitioner' such witness. As stated by the Court of Appeals (p. 5a of Appendices to the petition):

> "There is no evidence in the record that would indicate that there is the slightest probability that the

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[3] Petitioners' evidence was that there had been no zoning amendments in Euclid lessening residential requirements to permit business on the north side of Lake Shore Boulevard from East 222nd Street east to the east boundary of the city, being the area in which petitioners' lands are located, since the adoption of the Ordinance in 1922, being the same ordinance that was before the Court in *Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926). Also, petitioners' uncontroverted evidence was to the effect that the present trend in city planning in Euclid is to more highly restrict the lands abutting on Lake Shore rather than to lessen the use restrictions.

> city authorities will lessen the use restrictions of its zoning ordinances in the neighborhood in which the property here appropriated is located. The property of the defendants is lakefront property originally used as country estates and surrounded by single family dwellings and apartments, some of the garden-type, and two-family houses fronting on the Boulevard. The zoning ordinances of the City of Euclid have maintained the standard of this territory as a residential area and there is not the slightest evidence that within the foreseeable future any lessening of use restrictions will occur."

Such statement of the Court of Appeals is a fair summary of the record not only at the times complained of in petitioners' brief, but also at the end of the trial.

With such state of the record the petitioners produced so-called expert witnesses, of whom it was inquired as to what they considered to be the highest and most valuable use to which the property being appropriated could be put. (The uncontradicted evidence was that the property was restricted as set forth in the quotation above made from the Court of Appeals' opinion.) Such witnesses were then called upon to testify as to their opinion as to the market value of the parcel sought to be evaluated for its highest and best use. Counsel for the City of Euclid objected to the question as put until the inquiry be limited to the market value of the property for the highest and best use to which it could reasonably be lawfully put in view of the zoning restrictions. Such objection with such limitation was consistently sustained, throughout the proceedings, by the trial court.

The petitioners consistently declined to introduce any evidence as to the market value of the parcels in question for the highest and most valuable use to which they might lawfully be put. The City of Euclid produced evidence

of experts on the value of the property for the highest and most valuable use to which the property might be lawfully put.[4] The jury returned its verdicts equivalent to the highest value testified by such experts. As stated by the Court of Appeals (p. 5a of Appendices to Petition):

> "In each instance the jury's verdict was for the highest value given by the city's expert witnesses, there being no other testimony on the subject of value, the defendants' experts not being asked to testify as to their opinion of the value of the various parcels when considered for the highest and best use for which the property was zoned."

There was no evidence offered as to the cost of the parcels in question. The footnote set forth on page 6 of petitioners' brief is a statement outside of the record. We therefore have no knowledge as to whether it be true or false. The statement on page 114 of the Zevin record is as follows:

> "Q. What was the fair price of the property known as Parcel No. 1, which you sold to The Lakeshore Company?
>
> (This question was objected to and objection sustained.)
>
> "Mr. Sellers: If permitted to answer, we expect the witness to say: $124,750.00."

Likewise, the reference to page 109 is:

> "Q. Referring to the sale of the front of the property to the Lakeshore Company, and I understand you were a party to the deed?
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> A. Yes, sir.
>
> Q. What was the sale price?

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[4] The City had employed the Valuation Committee of The Cleveland Real Estate Board to make the appraisal. Three of the committee members testified as to fair market values.

Mr. Graham: I object.

A. $117,000—

The Court: Wait a minute. Objection sustained." [5]

From such state of the record, it is patent that the only question of law that could be presented is:

QUESTION PRESENTED.

Where the property owner's uncontradicted evidence, when construed most favorably to him, shows that there is little or no prospect that the zoning classification of property being taken in an appropriation proceeding may be changed within the reasonably foreseeable future, so as to permit a less restricted use of the property being appropriated, is the property owner deprived of property without due process of law where the jury is limited in its determination of the compensation due and payable to the owner in an appropriation proceeding to the fair market value of the lands taken when used for the highest and most valuable use to which they may lawfully be put by reason of the provisions of a municipal zoning ordinance?

REASONS WHY THE WRIT SOUGHT SHOULD BE DENIED.

In view of the record in this case in the state court it is patent that the trial court in its admission of evidence and its instructions to the jury followed strictly the rule established by the uniform course of decisions of the courts throughout the United States. It merely restrained the property owner from attempting to establish a purely

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[5] The transfer was from one petitioner (Zevin) to the other petitioner (Lake Shore Co.), after the appropriation proceeding was filed in court. It was not an arm's length transaction.

speculative value which was without probability. As stated by Mr. Justice Butler, in *Olsen v. United States*, 292 U. S. 246, 257:

> "Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration for that would be mere speculation and conjecture to become a guide for the ascertainment of value—a thing to be condemned in business transactions as well as in judicial ascertainment of truth."

The trial court in the instant case followed the rule thus stated by this Court. There was no evidence of any reasonable probability that the lands in question would ever be rezoned in such manner that they could be used for commercial use. In fact, petitioners' own evidence strongly tended to establish that there was no tendency in such direction.[6]

In the decisions of the state courts of the various jurisdictions there has been established a rule as to when

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[6] The trial court, in an action brought before it, would be required to enjoin any violation of the Euclid Zoning Ordinance. *Sec. 715.30* of the Revised Code of Ohio provides:

> "No person shall erect, construct, alter, repair, or maintain any residential building, office, mercantile building, workshop, or factory, including a public or private garage, or other structure, within any municipal corporation wherein ordinances or regulations have been enacted pursuant to Sections 715.26 to 715.29, inclusive, of the Revised Code, or Section 3 of Article XVIII, Ohio Constitution, unless said ordinances or regulations are fully complied with. In the event any building or structure is being erected, constructed, altered, repaired, or maintained in violation of any such ordinances or regulations, or there is imminent threat of violation, the municipal corporation, or the owner of any contiguous or neighboring property who would be especially damaged by such violation, in addition to any other remedies provided by law, may institute a suit for injunction to prevent or terminate such violation."

evidence of the value of a property for uses other than those permitted by zoning ordinances may and may not be received in an appropriation proceedings. It is well stated in 4 *Nichols on Eminent Domain,* 141, Sec. 12.322, as follows:

> "Insofar as existing zoning restrictions circumscribe the available uses to which land may be devoted they unquestionably affect the market value of property and no evidence in support of an enhanced value may be given where such enhanced value would be the result of a proscribed use.
>
> "However, where the enactment of the zoning restrictions was not predicated upon the inherent evil of the prescribed use—in other words, where the forbidden use is malum prohibitum rather than malum per se—and there is a possibility that the zoning restrictions may in the future be repealed or amended so as to permit the use in question, such likelihood may be considered *if the prospect of such repeal or amendment is sufficiently likely as to have an appreciable influence upon the present market value.* It follows from the foregoing that *such possible change in the zoning regulations must not be remote or speculative.*" (Emphasis ours.)

Many authorities are collected by such author supporting such rule.

For a period of time the intermediate courts of the State of Texas followed a different rule, but in *City of Dallas v. Andrews,* 149 Texas 609, the Supreme Court of that state set aside such former rule by the following pronouncement in paragraph 7 of the syllabus:

> "7. Where zoning ordinances or other legal restrictions apply to property which is subject of condemning proceeding, whether consideration should be given to the use for which the property is suitable and adaptable, though prohibited by the zoning or-

dinance, for the purpose of arriving at market value, is dependent upon whether the trial judge is satisfied from the evidence as a whole that there is a reasonable probability that the zoning or other restriction will be lifted within a reasonable time, in which event the evidence of other uses may be considered, *but* a contrary conclusion requires an exclusion of the evidence."

The Court of Appeals in its opinion (Petitioners' Brief, p. 18a) aptly and succinctly states the condition of the record which shows that it would have been improper to admit the evidence as to value which the petitioner claims was improperly excluded, as follows:

"The evidence shows that all of the lakefront property from the southern shore of Lake Erie to Lake Shore Boulevard is zoned for single family dwellings except the property fronting on the Boulevard in most instances to a depth of one hundred fifty feet which is zoned for multi-family units. This depth has been extended one or two hundred feet in one or two instances for a garden-type multi-family development. The only retail business now allowed on the north side of Lake Shore Boulevard, near the property taken as shown by the evidence, is between 218th is no evidence in this record that would indicate any Street and 224th Street. As was stated above, there is no evidence in this record that would indicate any purpose on the part of the public authorities or the slightest probability that the City will within the foreseeable future lessen the use restrictions of its zoning ordinance dealing with its lakefront property nor does any trend of development in the neighborhood where this property is located indicate that in the foreseeable future a plan of city development of single homes will in the interests of city planning require changes causing greater congestion and increased traffic hazards on its public thoroughfares. It

could be argued that the rapid growth of this city of homes came into being because of the zoning protection of the householder." (Emphasis supplied.)

Since the record discloses that petitioners' own evidence shows t[illegible] was no probability that the property taken could law[illegible]ly be used for the purpose upon which their speculati[illegible] evidence of value was based, or in other words that there was no reasonable probability that the property would be rezoned to permit such use, we submit that the evidence was based upon speculation as to unforeseeable probabilities and would be inadmissible under the rules of evidence in any state in an appropriation proceeding. The refusal of such evidence could not under any theory of law constitute a taking of property without due process of law, as asserted by petitioners.[7]

Since the trial of the appropriation proceeding, an amendment to *Sec. 719.09* of the Municipal Appropriation Act of Ohio has become effective. This amendment excludes from consideration in determining fair market value any use which is in violation of any statute or ordinance. The section now reads:

"Sec. 719.09—SIGNING ASSESSMENT.

The assessment of compensation by a jury as provided in Sec. 719.08 of the Revised Code shall be in writing, signed by the jury, and shall be so made that the amount payable to the owners of each lot or parcel of land may be ascertained.

In arriving at such assessment of compensation for such lot or parcel, any use or occupancy which is in violation of any statute or ordinance, shall be excluded from consideration in determining fair market value."

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[7] The Trial Court was also cognizant of the strong presumption of validity, which applies to legislative acts in general, and with equal force to a zoning ordinance.

If this Court were to reverse the state courts in these cases, limiting the evidence of value to the highest and most valuable lawful use under the existing zoning ordinance, which petitioners' own evidence showed there was no probability of change in such zoning ordinance so as to permit a less restrictive use, and remand the cases for a new trial, the Trial Court would be confronted with the present provision of the above section of the Ohio Municipal Appropriation Act.

CONCLUSION.

Our opponents have cited the celebrated case of *Euclid, et al. v. Ambler Realty Co.*, 272 U. S. 365 (1926) as authority for modern zoning ordinances. In this we agree. The same Euclid ordinance was before the Court in that case. There it was determined the ordinance stood, since the regulations pursuant thereto were fairly debatable. There also, in answer to complaint of the property owner against the planning of the city, Mr. Justice Sutherland in the *Opinion* said:

> "If the municipal council deemed any of the reasons which have been suggested, or any other substantial reason, a sufficient reason for adopting the ordinance in question, it is not the province of the court to take issue with the council. We have nothing to do with the question of the wisdom or good policy of municipal corporations."

Contrary to the statement in petitioners' brief that the city had used its zoning power to confiscate the use of petitioners' lands, the evidence they offered was that the current residential zoning had been maintained on the lands and their surrounding area north of Lake Shore Boulevard under the general city plan, for many years prior to acquisition by petitioners. They complain of the

same Euclid ordinance sustained in the *Ambler* case. They argued below the ordinance was archaic and in contrast that legislative authority, to protect the public health, morals, safety and general welfare of the people by zoning regulations, must yield in favor of real estate "experts," where their own evidence showed no probability of a zoning change within the foreseeable future.

Such evidence of the petitioners was on appeal carefully considered and weighed by the judges of the Eighth Appellate District of Ohio. Unanimously the verdicts were judicially determined to be correct and just compensation. To hold otherwise would mean to permit conjectural elements and speculation with attendant swollen awards, which the Federal Constitution does not compel. Here the petitioners' awards do no violence to constitutional guaranties. They represent market values for the most profitable and valuable use to which the lands may lawfully be put.

For these reasons no question is presented for Federal review. The trial proceeded conformably to petitioners' rights and privileges. The jury awards represent just compensation under the Federal standard.

Respectfully submitted,

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